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No. 789

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In the Supreme Court of the United States

OCTOBER TERM, 1957

CHA'O LI CHI, PETITIONER

v.

JOHN L. MURFF, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	10
Conclusion	18

CITATIONS

Cases:

Carlson v. *Landon*, 342 U.S. 524	16
Chien Fan Chu v. *Brownell*, 247 F. 2d 790	17
Chiu But Hao v. *Barber*, 222 F. 2d 821	12
D'Antonio v. *Shaughnessy*, 139 F. Supp. 719	17
Dolenz, United States ex rel. v. *Shaughnessy*, 200 F. 2d 288, certiorari denied, 345 U.S. 928	12
Dolenz, United States ex rel. v. *Shaughnessy*, 206 F. 2d 392	6, 12, 16
Fong Sen v. *United States Immigration and Naturalization Service*, 137 F. Supp. 236, affirmed, 234 F. 2d 656	17
Gutnayer v. *McGranery*, 108 F. Supp. 290, modified and affirmed, *sub nom. Brownell* v. *Gutnayer*, 212 F. 2d 462	11
Hintopoulos v. *Shaughnessy*, 353 U.S. 72	11
Japanese Immigrant Case, The, 189 U.S. 86	16
Jay v. *Boyd*, 351 U.S. 345	11
Lavdas v. *Holland*, 139 F. Supp. 514, affirmed, 235 F. 2d 955	17
Leong Choy Moon, United States ex rel. v. *Shaughnessy*, 218 F. 2d 316	12
Lukman v. *Holland*, 149 F. Supp. 312	17
Marcello v. *Bonds*, 349 U.S. 302	11
Namkung v. *Boyd*, 226 F. 2d 385	12
United States v. *Nugent*, 346 U.S. 1	13, 14, 16

Statutes and regulations:

	Page
Administrative Procedure Act, 60 Stat. 237, as amended:	
Section 5	10
Section 7	10
Displaced Persons Act of 1948, 62 Stat. 1009, as amended, Section 4	17
Immigration Act of 1924, 43 Stat. 153, Section 3(1)	3
Immigration and Nationality Act of 1952, 66 Stat. 163:	
Section 212 (a)(27)	5, 6
Section 243 (h)	4, 5, 6, 11, 12, 14
Section 244 (a)	11, 12
Refugee Relief Act of 1953, 67 Stat. 400, as amended, 68 Stat. 1044:	
Section 6	2, 4, 5, 6, 7, 10, 12, 13, 14, 17
Section 15	11
Selective Service Act of 1948, 62 Stat. 604, as amended, Section 6 (j)	13
8 C.F.R. (1956 Supp.) 245a.11	15
8 C.F.R. (1956 Supp.) 292.11(b)	15

Miscellaneous:

H. Rep. No. 1323, 83rd Cong., 2d Sess., p. 10.	13

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 23-31) is reported at 250 F. 2d 854. Opinions of the district court appear at R. 34-42 and App. 3a-9a and at App. 12-15a.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1957. The petition for a writ of certiorari was filed on February 17, 1958. The juris-

[1] "App." designates petitioner's appendix in the Court of Appeals, now included in the record before this Court. "R." designates the immigration file which has been paginated and lodged herewith.

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the hearing given petitioner (a person concededly subject to deportation), pursuant to his application for adjustment of status under Section 6 of the Refugee Relief Act of 1953, at which he was afforded full opportunity affirmatively to establish his claim of fear of persecution, advised of the content of confidential information considered on that issue, and granted full opportunity to rebut it, was invalid for the reason that the source of the government's information was not divulged to him.

2. Whether the administrative decision that petitioner had failed to establish a rational basis for the asserted fear of persecution was arbitrary and capricious.

STATUTE INVOLVED

Section 6 of the Refugee Relief Act of 1953, 67 Stat. 400, as amended, 68 Stat. 1044, provides in pertinent part:

> Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide nonimmigrant and that he is unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion * * * may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all the facts and circumstances of the case, determine that such alien has been of good moral character for the preceding five years and that the alien was physically present in the United

States on the date of enactment of this Act and is otherwise qualified under all other provisions of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed, the Attorney General shall report to the Congress all the pertinent facts in the case. If, during the session of the Congress in which a case is reported or prior to the end of the session of the Congress next following the session in which a case is reported, the Congress passes a concurrent resolution stating in substance that it approves the granting of the status of an alien lawfully admitted for permanent residence to such alien, the Attorney General is authorized, upon the payment of the required visa fee, which shall be deposited in the Treasury of the United States to the account of miscellaneous receipts, to record the alien's lawful admission for permanent residence as of the date of the passage of such concurrent resolution. * * *

STATEMENT

On February 3, 1939, petitioner, a native and citizen of China entered the United States, under Section 3 (1) of the Immigration Act of 1924, as the son (11 years old at the time) of a Chinese government official. Petitioner's non-immigrant status, which depended on his father's official position, terminated when, in 1946, his father finished his work in this country and returned to China (R. 153). As a result, petitioner and the remainder of his family in this country (his mother, brother and sister) became subject to deportation (R. 184). Seeking to avoid expulsion, they applied for suspension of deportation. By order dated May 11, 1950, their applications were granted by the Board of

Immigration Appeals. Their cases were then referred to Congress for final approval. Thereafter, on December 27, 1950, the Commissioner of Immigration and Naturalization moved that the orders of suspension of deportation be rescinded, that the cases be withdrawn from Congress, and that the Board proceedings be reopened, stating that petitioner's mother and sister had returned to China and that there should be further investigation on the question of legalizing the immigration status of petitioner. On January 31, 1951, the Board rescinded the prior order of May 11, 1950, and reopened the proceedings as to petitioner and his brother "for such further consideration as may be appropriate" (R. 180-181). Petitioner's brother returned to China soon thereafter (R. 161).

On December 4, 1952, following a hearing (R. 156-179) before a Special Inquiry Officer pursuant to the order of reopening, petitioner's applications for suspension of deportation or voluntary departure were both denied, and he was ordered deported for failure to maintain an exempt status (R. 152-155). Petitioner did not seek administrative review of the order.

On November 17, 1954, petitioner applied both for a stay of deportation under Section 243 (h) of the Immigration and Nationality Act of 1952 and for adjustment of status under Section 6 of the Refugee Relief Act of 1953, claiming that if he were deported to the mainland of China he would be subject to persecution by the Communist government (R. 149-151). A formal application for Section 6 relief was filed on November 23, 1954 (R. 62-64). Separate hearings were given petitioner on each of these applications.

Following the hearing in the Section 6 proceeding (R. 97-111), the Special Inquiry Officer recommended that petitioner's application be denied. He found that petitioner had failed to meet the requirements of Section 6 because, if he were seeking entry into this country, he would be excludable under the provisions of Section 212 (a)(27) of the 1952 Act.[2] He based his recommendation in part upon confidential and secret information "of a nature which prohibits its disclosure to the applicant * * *" (R. 56). This recommendation was approved by the Acting Regional Commissioner on June 16, 1955 (R. 56).

On June 15, 1955, petitioner's application under Section 243 (h) was denied, also after hearing (R. 117-148), upon the ground that he had failed to show that he would be subject to physical persecution if returned to China and upon the basis of "confidential and secret information in possession of the Government * * *" (R. 114, 112-115).

Petitioner thereafter applied for a stay of deportation pending judicial review. Upon such review in the district court before Judge Noonan, petitioner claimed, *inter alia*, that he was denied due process in both administrative proceedings because of the use of confidential and secret information not disclosed to him. Judge Noonan found that a proper determination of

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[2] Section 212 (a)(27) provides:

"(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

"(27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;"

whether petitioner was qualified under Section 212 (a)(27), *supra*, fn. 2, and hence under Section 6, required that he be fully "informed of the nature of the information being used against him so that he might attempt to rebut it" (R. 40). He ordered that the Section 6 proceeding be remanded and petitioner informed of "the broad nature of the 'secret and confidential' information" (R. 34-42, 41). Judge Noonan thought such divulgence necessary because of the ground upon which the Section 6 application was denied. He pointed out (R. 39-40):

> The wording of the administrative decision in the Section 6 proceeding denies the petitioner's application not on the ground that he has no legitimate fear of persecution, but rather on the ground that he is not otherwise eligible according to the provisions of the Immigration and Nationality Act, and indicates that the secret and confidential information used did not go toward the decision on the question of fear of persecution, but rather that it affected that part of the proceeding referring to the provisions of the Immigration and Nationality Act.

As to the use of confidential information in the Section 243 (h) proceeding—which resulted in a denial of petitioner's application solely on the basis of the persecution issue—Judge Noonan found that the ruling in *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392 (C.A. 2), holding that use of confidential information in a Section 243 (h) proceeding does not constitute a denial of due process, "presents an insurmountable barrier to [petitioner's] success" (R. 38-39).

Pursuant to Judge Noonan's order, a further hearing was held, on March 27, 1956, on petitioner's Section 6 application. At this hearing, the Special Inquiry Officer divulged, in six categories, the "broad nature" of the confidential and secret information, in summary as follows (R. 6):

(*1*). That petitioner had close relationships with his half-brother Chi Chao Ting, who was reported to be active in the Communist cause, and with his father, who was formerly editor of a Chinese newspaper published in New York and popularly known as a Communist publication; and that petitioner's father returned to the Chinese mainland to accept a teaching position at Peiping University under the sponsorship of the Chinese People's Republic;

(*2*). That petitioner himself testified that in the early days of the Communist regime in China he was favorably impressed;

(*3*). That petitioner was reported to have been active, in 1949, in the Chinese Students Christian Association, which was purportedly Communist controlled, and that at that time petitioner was reported to have upheld Communism as being superior to Capitalism;

(*4*). That petitioner had participated in a Communist-inspired brotherhood festival at the "Peoples Drama Theatre" on February 11, 1951;

(*5*). That petitioner was closely associated with one Kee Min Ta, who was reported to be active in Communist affairs;

(*6*). That petitioner was a member of the American Youth for Democracy, an organization reported to be active in Communist affairs.

The Special Inquiry Officer was of the view that this information indicated that petitioner was not "as anti-communistic in political opinion as would appear from his application for adjustment of status * * *" (R. 6). Petitioner was then afforded full opportunity to answer these specifications in detail. He denied each allegation insofar as it indicated any personal predilection on his part for Communism. He denied that he had a close relationship with his half-brother who, he understood, was a member of the Communist Party (R. 8-9); that his father had Communistic leanings, or returned to teach in Peking under the auspices of the Communists (R. 9-10); and that he himself was a member of the Chinese Students Christian Association (R. 17). He admitted membership in the American Youth for Democracy, but said that it was only for a few months during 1943, while he was a student at St. John's College, and only because the organization supported the New Deal and the war effort (R. 22). He admitted that in the early days of the Communist regime he was pleased with its land reforms (R. 14) and believed that the change from the Chiang Kai-shek government was a relief (R. 15-16), but stated that his views have now changed (R. 16).[3]

Additionally, petitioner sought affirmatively to establish his fear of persecution, stating that he did not "agree with communism on principle" (R. 22); that, if returned to China, he would not be able to practice his profession or "be proficient" as a dancer—although the Communist Government would be able to use him—because he did not "believe in the goals, the exhortation of the communist government" (R. 23); that it would

[3] His full rebuttal is set forth at R. 8-22 and App. 26a-42a.

mean "doing exactly what is assigned to me" (R. 22-23); that by refusing to perform he would "be made an example of" (R. 23); and that only early in the Communist regime had he preferred it over the Nationalists (R. 25). He further based his claim of fear of persecution on the grounds that he had not returned home with his family; that, despite repeated requests, he had continued to remain here; and that he believed that his family could not protect him from persecution (R. 23-24). Following this hearing, the Special Inquiry Officer concluded (R. 2):

> Despite the applicant's categorical denial of the allegations contained in the confidential and secret information, the broad and general nature of which was disclosed to the applicant, it is concluded that he has failed to establish that he has reasonable grounds on which to fear persecution because of his political opinion should he return to China, and his application for adjustment of status should be denied on that ground.

On May 9, 1956, the Acting Regional Commissioner approved this recommendation (R. 2).

On October 23, 1956, Judge McGohey denied petitioner's application to set aside this administrative decision, holding that "it cannot be said that [the Attorney General] acted capriciously, arbitrarily or unfairly in concluding that the petitioner has failed to sustain his burden of establishing reasonable grounds for his asserted fear of persecution if returned to China" (App. 15a; 12a-15a).

The Court of Appeals unanimously affirmed, pointing out that petitioner had been informed of the con-

fidential information and afforded an opportunity to rebut it (Pet. App. 23-31).

ARGUMENT

1. Petitioner's broad contentions that the consideration of confidential information by the Immigration and Naturalization Service, in denying his application for adjustment of status, violated the requirements of Section 6 of the Refugee Relief Act of 1953, *supra*, pp. 2-3, and of due process (Pet. 9-15), are not, in fact, the real issues in this case. For, pursuant to Judge Noonan's order, the proceeding was remanded for the very purpose of informing petitioner of "the broad nature of the 'secret and confidential' information being used against him" (R. 41). This information was thereafter divulged to petitioner, and he was granted full opportunity to rebut its implications. See the Statement, *supra*, pp. 7-8. Hence, the sole issue on this aspect of the case is whether the hearing granted petitioner was nonetheless rendered invalid because he was not also informed of the identity of the persons providing the information considered, and consequently not afforded an opportunity to cross-examine them.

a. No requirement for disclosure of the source of information has been enacted by Congress in the statute here involved. In fact, the Refugee Relief Act contains no provision whatever for a hearing in a Section 6 proceeding. Hence, petitioner's argument (Pet. 14-15) that he was entitled to a hearing in accord with the standards of the Administrative Procedure Act, 60 Stat. 237, as amended, is without foundation. Section 5 of the Administrative Procedure Act makes applicable the hearing provisions of Section 7 only where the "adjudication [is] *required by statute* to be determined on the record after opportunity for an agency hearing"

(emphasis added). See *Gutnayer* v. *McGranery*, 108 F. Supp. 290, 291-292 (D. D.C.), modified and affirmed on other grounds, *sub nom. Brownell* v. *Gutnayer*, 212 F. 2d 462 (C.A. D.C.). Moreover, Section 15 of the Refugee Relief Act (67 Stat. 400, 406) provides that "* * * all of the provisions of the Immigration and Nationality Act (66 Stat. 163) shall be applicable under this Act." Proceedings under the Immigration and Nationality Act are governed by the special provisions set forth therein rather than the Administrative Procedure Act. See *Marcello* v. *Bonds*, 349 U.S. 302.

The hearing standards under analogous provisions of the Immigration and Nationality Act of 1952 have been construed to permit the use of confidential information even where, unlike the situation in this case, the alien is not advised of the content of the information and hence not afforded an opportunity to rebut it. See *Jay* v. *Boyd*, 351 U.S. 345, where this Court sustained the use of confidential information in a proceeding for suspension of deportation under Section 244 (a), pointing out that such relief is "not a matter of right * * * [but] a matter of grace" (351 U.S. at 354), and that "§ 244 gives no right to the kind of a hearing on a suspension application which contemplates full disclosure of the considerations entering into a decision" (*id.* at 355). See, also, *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77-79. Again, in determining the hearing requirements under Section 243 (h) of the 1952 Act, which grants relief from deportation for reasons parallel to those under Section 6,[1] it has

[1] Section 243 (h) provides:

"The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

been held that confidential information may be considered by the Attorney General and, in fact, "may be of great assistance to him in making his decision". *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392, 395 (C.A. 2). Such a proceeding does not involve the issue of the alien's "right to remain in the United States". *United States ex rel. Dolenz* v. *Shaughnessy*, 200 F. 2d 288, 291 (C.A. 2), certiorari denied, 345 U.S. 928. See, also, *United States ex rel. Leong Choy Moon* v. *Shaughnessy*, 218 F. 2d 316, 317 (C.A. 2), *Namkung* v. *Boyd*, 226 F. 2d 385, 388 (C.A. 9), and *Chiu But Hao* v. *Barber*, 222 F. 2d 821 (C.A. 9), stressing the limited scope of judicial review of an administrative decision denying relief under Section 243 (h).

A fortiori, the hearing accorded in a Section 6 proceeding—which likewise involves a matter of grace, not of right—suffices when not only is the alien given "full opportunity to testify and present evidence in support of his application * * *" (*United States ex rel. Leong Choy Moon* v. *Shaughnessy*, 218 F. 2d 316, 318 (C.A. 2)), but it also given a résumé of all other information considered, and afforded the chance to rebut it.

Petitioner seeks to distinguish between hearings under Sections 244 (a) or 243 (h) and those under Section 6, stating that the former provisions authorize a determination based upon the "opinion" or "discretion" of the Attorney General, while the latter grants no such broad executive discretion, providing only that the alien must "establish" fear of persecution in the administrative proceeding and that Congress must approve his application. But it cannot be presumed that Congress, in asking for a preliminary investigation by the Attorney General, intended that anything less than all available information should

be considered on the issue of persecution. "In providing a haven of refuge in the United States [under this Act], Congress also intended to provide adequate safeguards * * * against infiltration of subversives * * *". H. Rep. No. 1323, 83rd Cong., 2d Sess., p. 10. At the very least, considering the objectives of Section 6, its requirements are satisfied when, as here, the information considered was in fact divulged to petitioner and only the identity of the sources of the information was withheld. This is not a case in which, although the alien made out a *prima facie* case of fear of persecution, his claim was found unavailing for reasons not disclosed to him. As discussed *in* a, it is doubtful that, on his own testimony, petitioner made out a *prima facie* case of fear of persecution. But, assuming that he did, the fact is that the contrary considerations were disclosed to him and he was given an opportunity to rebut them. The case is thus similar to *United States* v. *Nugent*, 346 U.S. 1, where this Court had before it the issue of whether conscientious objectors seeking exemption from military service under Section 6 (j) of the Selective Service Act of 1948, 62 Stat. 604, as amended, are entitled to divulgence of F. B. I. reports considered by the Department of Justice in recommending to the appeal boards that the relief requested be denied. On that comparable issue, this Court held (346 U.S. at p. 6):

> * * * the Department of Justice satisfies its duties under § 6 (j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair

résumé of any adverse evidence in the investigator's report.

We submit that no more can be deemed required in a proceeding under Section 6. Like the applicant in *Nugent*, petitioner here had the burden of establishing a claim which might result in the granting of a privilege, as a matter of grace. His position was protected when he was given a résumé of the adverse information and an opportunity to rebut it.

Section 6 relief is so closely similar to the relief obtainable under Section 243 (h) that it must also be deemed to permit consideration of all relevant information on the issue of fear of persecution, at least where such information is divulged to the alien and he is afforded full opportunity to rebut it. Thus, both under Section 6 and 243 (h), complex political questions are involved—questions requiring evaluation of all available data. For example, it might be necessary to consider the alien's claim of persecution in the light of information concerning treatment afforded other aliens who had been denied relief and returned to Communist China; information as to the political beliefs of the alien and his family; and information as to the views expressed openly or secretly by Communist Chinese officials concerning the treatment that would be accorded to the alien if he were returned. Obviously, in order to obtain such information, free access to a network of sources is essential. To require that the government reveal these sources would curtail the effectiveness of its information-gathering facilities and cut off access to much pertinent material otherwise obtainable. The net result might be to preclude a full and complete evaluation of the alien's claim. Thus,

in some cases an alien's application might be denied because relevant information reenforcing his claim is unavailable, whereas in other cases missing information might show that there is no basis for apprehending persecution or that the alien is ineligible for relief for other reasons.

b. In view of the nature and purposes of the statute, petitioner's attempt to rely on the regulations promulgated thereunder (Pet. 12-13) is unavailing. 8 C.F.R. (1956 Supp.) 245a.11 requires the immigration officer to prepare a memorandum of his findings. This was done. 8 C.F.R. (1956 Supp.) 292.11(b) states that the alien shall have the right to counsel, that he may testify, introduce evidence and cross-examine witnesses. These requirements were also met. We do not believe that the provision for cross-examination can reasonably be construed as requiring the government to produce all persons, including those who may be abroad, from whom it has obtained information on the likelihood of persecution. If the government calls witnesses, the alien must, of course, be allowed to cross-examine them. But this does not preclude the government from requiring that the alien, who carries the burden of establishing fear of persecution, meet and explain the adverse information which it has concretely disclosed to him.

c. Petitioner's constitutional challenge to the proceedings (Pet. 15) is without foundation since the basic question as to whether he is entitled to remain in the United States has already been decided against him in admitted conformity with all constitutional requirements.[5] Petitioner is thus no longer "a part of our

[5] Petitioner never sought review of the order of deportation. See the Statement, *supra*, p. 4.

population" under any color of right, as distinguished from the situation in cases he relies upon (Pet. 15). See particularly *The Japanese Immigrant Case,* 189 U.S. 86, 100-101, where the complaint as to the procedure was made with respect to the basic proceeding which would itself determine whether the alien's stay in the United States was or was not lawful.

As to matters dealing not with that decisive aspect, but only with the collateral execution of the order of deportation, we think the law is as it was recently restated in *Carlson* v. *Landon,* 342 U.S. 524. In that case, as here, the formal proceedings to determine the alien's basic right to remain in the United States were not the subject of the dispute; the issue was the collateral matter of the Attorney General's decision on bail pending such proceedings, and it was resolved by this Court in favor of the Attorney General's power to act summarily. Certainly, where, as here, the basic determination of the alien's deportability has already been made, the collateral matter of adjustment of status is not one which, on constitutional grounds, must be made the subject of formal hearings. Particularly is this true where the alleged defect in the hearing is only in the failure to divulge the source of information which petitioner was given in résumé and afforded an opportunity to rebut. Cf. *United States* v. *Nugent,* 346 U.S. 1, 9-10; *United States ex rel. Dolenz* v. *Shaughnessy,* 206 F. 2d 392, 394-395 (C.A. 2).

2. Petitioner further challenges the instant decision as "completely contrary to all the evidence and wholly arbitrary" (Pet. 16-20). The fact is, however, that on his own testimony, without regard to adverse information, petitioner failed to meet his burden of proof. At best, his affirmative showing indicated a distaste for

Communism and a desire to remain in this country. His alleged fear of persecution rested only on the unsupported belief that he would be regarded with suspicion because he had not returned with his family to China. This despite the fact that others of his family have not been subjected to persecution, although they returned to China later than the father. Such speculation certainly does not establish the "rational basis" for fear of persecution which is held essential under the cases. See *Lavdas* v. *Holland*, 235 F. 2d 955, 957-958 (C.A. 3) (so construing Section 4 of the Displaced Persons Act of 1948, as amended, the predecessor of Section 6); *Fong Sen* v. *United States Immigration and Naturalization Service*, 137 F. Supp. 236, 237 (E.D. La.), affirmed, 234 F. 2d 656 (C.A. 5); *Lukman* v. *Holland*, 149 F. Supp. 312, 315-316 (E.D. Pa.). And compare *Chien Fan Chu* v. *Brownell*, 247 F. 2d 790, 793-794, where the Court of Appeals for the District of Columbia Circuit found a substantial basis for the claim of fear of persecution in a case in which the aliens were members of high-ranking Nationalist Chinese families that had actively opposed the Communist regime.[6] On petitioner's showing alone, Judge McGohey was correct in holding that the Attorney General had not "acted capriciously, arbitrarily or unfairly in concluding that the petitioner has failed to sustain his burden of establishing reasonable grounds for his asserted fear of persecution if returned to China" (App. 15a).

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[6] *D'Antonio* v. *Shaughnessy*, 139 F. Supp. 719, 723 (S.D. N.Y.), disagreed with the district court decision in the *Lavdas* case, 139 F. Supp. 514, 515 (E.D. Pa.), affirmed, 235 F. 2d 955 (C.A. 3), only in so far as that case, in dictum, indicated that fear of persecution must be limited to fear of the *de jure* or *de facto* government. It agreed, however, that the alien is required "to establish the existence of a reasonable fear of persecution."

Petitioner's failure to meet his statutory burden emphasizes the unsubstantiality of his procedural attack. This is not a case in which, after an alien had established fear of persecution, information outside the record was deemed sufficient to override his showing. Rather, this is a case in which, even if such information had not been considered, the decision would have been adverse to petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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